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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BLANCA TORRES, Plaintiff and Respondent, v. GALAXY OIL COMPANY et al., Defendants and Appellants.	G056946 (Super. Ct. No. 30-2018-00982482) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Layne H. Melzer, Judge. Affirmed.

WFBM, Sage R. Knauft and Reyna E. Macias for Defendants and Appellants.

Aegis Law Firm, Samuel A. Wong and Ali S. Carlsen for Plaintiff and Respondent.

* * *

Defendants Galaxy Oil Company, Galaxy/Firestone, and Galaxy/Harbor (defendants) appeal an order denying their motion to compel arbitration of claims brought in an action filed by plaintiff Blanca Torres. They argue they proved there was an arbitration agreement signed by plaintiff, and plaintiff had the burden to prove her claims do not fall within the arbitration agreement, which she failed to do. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

In January 2017 defendants hired plaintiff to work as a cashier in one of their gas stations. About one month later defendants presented to plaintiff "a stack of different documents," including a three-page single-spaced Employee Acknowledgement and Agreement (Agreement). Plaintiff signed the Agreement.

The first sentence of the Agreement set out plaintiff's receipt of a copy of defendants' employee handbook and her agreement to familiarize herself with it. The Agreement stated the handbook described defendants' at-will employment policies. It also stated defendants "promote[d] a voluntary system of alternative dispute resolution, which involves binding arbitration to resolve all disputes, which may arise out of the employment context."

The Agreement continued, "I voluntarily agree that any claim, dispute, and/or controversy (including, but not limited to, any, claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, [(FEHA)], Title VII of the Civil Rights Act of 1964 [(42 U.S.C. § 20003 et seq.; Title VII)], as amended, as well as all other state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and [defendants] . . . arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with [defendants], whether based on tort, contract, statutory, or equitable law, or otherwise (with the sole exception of claims arising under the National

Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act . . . ."

The last sentence at the end of a lengthy paragraph in the middle of the second page of the Agreement stated in all caps and bold, "I understand by voluntarily agreeing to this binding arbitration provision, both [defendants] and I give up our rights to trial by jury."

The next paragraph of the Agreement stated: "I understand that this voluntary alternative dispute resolution program covers claims of discrimination or harassment under Title VII of the Civil Rights Act of 1964, as amended. By marking the box to the right, I elect to waive the benefits of arbitrating Title VII claims. [ ]" Plaintiff checked the box.

Above the signature block were the following, in bold and all caps: "My signature below attests to the fact that I have read, understand, and agree to be legally bound to all of the above terms. [¶] Do not sign until you have read the above acknowledgement and agreement."

According to defendants, at an orientation for new employees attended by plaintiff, their chief executive officer personally went through each page of the employee manual and allowed time for questions. Plaintiff never raised any concerns.

According to plaintiff, no representative of defendant reviewed the Agreement with her, explained arbitration, or told her she was signing an arbitration agreement. When plaintiff signed the Agreement she understood defendants were "asking [her] to confirm that [she] received the Employee Handbook, waive [her] right to go to court, and submit all of [her] claims to something called arbitration." Based on reading the terms of the Agreement plaintiff "understood that by marking the box, [she] was making it clear that [she] did not agree to waive [her] right to go to court for

discrimination and harassment claims." She "would have never voluntarily agreed to waive [her] right to try these types of claims in front of a judge and a jury."

In the fall of 2017 plaintiff told defendants she was pregnant. During the pregnancy she was off work two days for treatment. When she went back to work she began her pregnancy leave, which expired before she gave birth.

Plaintiff filed suit against defendants alleging causes of action for sex, pregnancy, and disability discrimination; failure to reasonably accommodate, engage in the interactive process, and prevent discrimination and retaliation; retaliation; and wrongful termination. She alleged defendants had no problems with her work until they learned she was pregnant. She further alleged defendants discriminated against her and constructively terminated her based on her pregnancy.

Defendants answered and three months later filed a motion to compel arbitration and stay the action. Defendants attached a copy of the Agreement, contending it encompassed all of plaintiff's causes of action. They argued this satisfied their burden to show the existence of an arbitration agreement. They asserted the Federal Arbitration Act governed the Agreement and both federal and California law favor arbitration.

Plaintiff argued she did not agree to arbitrate her harassment and discrimination claims and thus there was no meeting of the minds. She believed by checking the opt-out box she did not intend to waive her right to a jury trial on those claims. Because she was not a lawyer, she should not be expected to understand the distinction between Title VII claims, which were referred to in the opt-out provision, and other harassment and discrimination claims.

In reply, among other things, defendants argued the objective intent of the parties, not plaintiff's undisclosed intent, governed the interpretation of the Agreement. They further asserted any doubts as to the scope of the Agreement should be decided in favor of arbitration.

The court denied the motion because defendants did not meet their burden to show the existence of an agreement to arbitrate plaintiff's claims. It found "there was no meeting of the minds." The court noted the arbitration portion of the Agreement stated arbitration was voluntary and included an opt-out provision. It determined the Agreement "was unclear as to how [plaintiff] should complete [the Agreement] should she not agree to arbitrate."

The Agreement required plaintiff to do two things: confirm her receipt of the employee handbook and terms of employment and agree to binding arbitration. But as the court pointed out, there was only one place to sign at the end of the Agreement. Defendants failed to explain how plaintiff could agree with the employment terms and acknowledge receipt of the handbook while at the same time indicate she did not agree to arbitrate. If plaintiff failed to sign, that would show a refusal to acknowledge receipt of the handbook and employment terms. She checked the opt-out provision, but it only applied to Title VII claims. The court questioned whether it was reasonable to expect plaintiff to understand that limitation.

The court noted plaintiff's statement in her declaration that she did not agree to arbitrate harassment and discrimination claims. It found "within the constraints of the form provided by [d]efendants, [p]laintiff manifested her lack of agreement."

DISCUSSION

1. Standard of Review

The parties disagree about the correct standard of review. Defendants argue it is de novo, because the court did not rule on any conflicting evidence, while plaintiff contends the court made a factual determination after considering extrinsic evidence and thus a substantial evidence standard should be used. Plaintiff is correct.

"""'[W]hether a certain or undisputed state of facts establishes a contract is one of law for the court . . . . On the other hand, where the existence . . . of a contract or the terms thereof is the point in issue, and the evidence is conflicting or admits of more

than one inference, it is for the . . . trier of the facts to determine whether the contract did in fact exist . . . [.]' [Citations.]"' [Citations.] 'Mutual assent or consent is necessary to the formation of a contract' and '[m]utual assent is a question of fact.' [Citation.]" (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc*. (2015) 240 Cal.App.4th 763, 771-772 (*Vita*).)

Here, as in *Vita*, "the evidence regarding contract formation is conflicting because [plaintiff] claims there was no mutual assent." (*Vita, supra*, 240 Cal.App.4th at p. 772.) Thus, we use a substantial evidence standard. It makes no difference that defendants did not submit a declaration to counter plaintiff's explanation of her understanding of the Agreement. The court was required to determine whether there was mutual assent and did so, finding there was no mutual consent.

2. Existence of Arbitration Agreement

A party seeking to compel arbitration must prove, by a preponderance of the evidence, the existence of an agreement to arbitrate the claims made against it. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) In deciding a motion to compel, "the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question." (*California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204; *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626.) """[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."" (*Pinnacle*, at p. 236; Civ. Code, § 1648 ["However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract"].)

We use general contract interpretation principles to determine whether the parties have agreed to arbitrate a dispute. (*Pinnacle, supra*, 55 Cal.4th at p. 236.) """'The words of a contract are to be understood in their ordinary and popular sense.' [Citations.]" [Citation.] Furthermore, "[t]he whole of a contract is to be taken together,

so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)' [Citation.]" (*Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1, 9.) "'"Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings."'" (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 788 (*Esparza*).)

Defendants argue they showed the existence of an arbitration agreement by providing a copy of the Agreement signed by plaintiff. That, they contend, is all they were required to prove to shift the burden to plaintiff to show a defense to the agreement. Defendants are incorrect. They were also required to prove plaintiff agreed to arbitrate harassment and discrimination claim. And they failed to do so.[1]

In her declaration plaintiff stated that, when checking the box for the opt-out provision, she was expressing her intention not to waive her right to file an action for harassment and discrimination. Defendants argue this manifested only plaintiff's undisclosed intent not to arbitrate any harassment or discrimination claims. We disagree. Plaintiff was plainly manifesting her intent not to arbitrate those types of claims. (*Esparza*, *supra*, 2 Cal.App.5th at p. 788.) As the court noted, given the form of the Agreement, this was the best plaintiff could do to outwardly express that intention.

[1] Even if we accept defendants' premise that once they showed the existence of the Agreement signed by plaintiff the burden shifted to her to prove a defense, plaintiff still prevails. As explained below, plaintiff's declaration shows she understood that by checking the opt-out provision in the Agreement, she was preserving her right to a jury trial of harassment and discrimination clauses and did not agree to arbitrate them. The court found her declaration credible and we do not reweigh credibility. (*Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 518.)

Defendants challenge the court's reliance on plaintiff's declaration, arguing it contradicts the Agreement's express terms in violation of the parol evidence rule. This argument fails.

Because defendants did not object to plaintiff's declaration in the trial court, they cannot challenge the court's consideration of it. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23.) But we determine "the legal operation of the facts proved by such evidence." (*Id.* at p. 23 & fn. 18.)

Although the statutes are not identical, both Title VII and FEHA prohibit sexual harassment and pregnancy discrimination. (*Abed v. Western Dental Services, Inc*. (2018) 23 Cal.App.5th 726, 741, fn. 6; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 277-278.) The statutory schemes are similar enough that California courts often rely on Title VII cases for guidance in interpreting FEHA. (*Abed*, at p. 741, fn. 6; *Lyle*, at p. 278.) Plaintiff's explanation for her interpretation of the opt-out provision, that it included all harassment and discrimination claims, is a reasonable interpretation of the Agreement. And if the opt-out provision is unclear, the ambiguity must be construed against defendants as the drafters of the Agreement. (*Sandquist v. Lebo Automotive, Inc*. (2016) 1 Cal.5th 233, 247-248.)

Defendants argue the court erred in relying on *Esparza*, *supra*, 2 Cal.App.5th 781 and *Metters v. Ralphs Grocery Co*. (2008) 161 Cal.App.4th 696 as authority for its finding there was no meeting of the minds, claiming they are factually distinguishable . But as defendants recognize, these cases appear to have been cited only for that general principle. During argument of the motion, the court noted that despite possible factual differences, the "gestalt of those cases is, that before you can force someone into arbitration, . . . they have to agree to it." That is a correct interpretation and application of the general principles set out in those cases.

Defendants rely on the public policies favoring arbitration and resolving any doubt in favor of arbitration. However, those policies do "not come into effect until a

court has concluded that under state contract law, the parties entered into an agreement to arbitrate." (*Lopez v. Charles Schwab & Co., Inc*. (2004) 118 Cal.App.4th 1224, 1229.) Further, "[t]he strong policy in favor of arbitration may not be used to permit a party to enforce provisions of an arbitration agreement that, as here, either do not exist or were so poorly drafted that another party cannot be presumed to have agreed to them." (*Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1370.) Here, as discussed above, plaintiff reasonably interpreted the opt-out provision to mean it included all harassment and discrimination claims.

Defendants challenge the court's finding plaintiff opted out of arbitration entirely, arguing plaintiff never made such a claim. But we review the court's ruling, not its rationale. (*Goles v. Sawhney* (2016) 5 Cal.App.5th 1014, 1021.)

DISPOSITION

The order is affirmed. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.